Part 3 Domestic and International Sales Law CHAPTER 16 Sales and Lease Contracts: Performance, Warranties, and Remedies Page 358 CASE OPENER A Nightmare of a Vacation On April 19, 2014, plaintiffs bought the RV, a new 2014 Palomino trailer, from defendant for $26,000.25. On April 25, 2014, plaintiffs took possession of the RV. In June 2014, plaintiffs discovered water leaking into the RV from the emergency-exit window. Plaintiffs brought the RV to defendant for repair; defendant repaired the RV to plaintiffs' satisfaction, at no charge. In July 2014, during a trip to Michigan, plaintiffs discovered a different leak in the RV. During a rainstorm, water leaked into the dinette area, damaging the walls and causing electrical failure. Plaintiffs brought the RV to defendant for repair on July 14, 2014. Defendant told plaintiffs that the RV needed to be sent to the manufacturer for repair. Defendant told plaintiffs that it could not estimate how long the manufacturer would take to repair the RV. On August 2, 2014, plaintiffs verbally revoked acceptance of the RV. The manufacturer had the RV in repair from approximately August 4 through September 23, 2014. On September 28, 2014, plaintiffs' attorney sent defendant a letter revoking acceptance of the RV. On October 29, 2014, plaintiffs filed a four-count complaint against defendant, alleging the following. Since they purchased the RV, it had experienced numerous mechanical problems, including (a) water leakage through a defective emergency-exit window, (b) water leakage through a defective dinette window, (c) water leakage into a paneled wall, (d) an inoperative electrical system, (e) and "generally massive water leaks," which "have the potential of causing mold and serious health issues." Further, these "defects cannot be repaired. The [RV] was in repair for almost the entire summer of 2014, and still has not been repaired properly. Prior to filing this suit, Plaintiffs [sic] revoked their acceptance of the RV and canceled their contract. Defendant refused to return Plaintiffs' money." The questions that this case raises are Are these incidents a breach of contract? Or are they not material? Does the perfect tender rule apply here? Do these incidents constitute a breach of any of the implied warranties? Does the remedy of cure apply? To what extent does "cure" apply? Page 359 LEARNING OBJECTIVES LO 16-1 Differentiate between conforming and nonconforming goods. LO 16-2 Outline the perfect tender rule. LO 16-3 Define the right to cure. LO 16-4 Define commercial impracticability. LO 16-5 Define implied warranties of title, merchantability, and particular purpose. LO 16-6 Recognize the issues around third parties and warranties. LO 16-7 Describe what a warranty disclaimer is, and why it is used. LO 16-8 Describe the concept of cover and resale. LO 16-9 Recall the money damages that are available for breach of contract. When individuals enter into sales contracts

or leases with others, they need to know their rights and obligations so that they can engage in efficient business transactions. This chapter explains the performance obligations of sellers and buyers. In addition, it explains the performance obligations of lessors and lessees, which are similar to those of buyers and sellers. The chapter explains the perfect tender rule and exceptions to this rule. It also explains the buyer's general obligation to inspect, pay for, and accept goods, and it discusses exceptions to this general obligation. Moreover, it explains performance obligations under both express and implied warranties, breach of contract, and remedies available in the event of breach.

The Basic Performance Obligation LO 16-1 Differentiate between conforming and nonconforming goods. The obligations of sellers/lessors and buyers/lessees are determined by (1) terms the parties outline in agreements, (2) custom, and (3) rules outlined by the Uniform Commercial Code (UCC). This chapter focuses on rules outlined by the UCC. Under the UCC, sellers and lessors are obligated to transfer and deliver conforming goods. Buyers and lessees are obligated to accept and pay for conforming goods in accordance with the contract. Courts rely on UCC rules to clarify these obligations when the contract or lease the parties agreed to is unclear. In the Case Opener, was the motor home a "conforming" good? Should the buyers have returned the motor home to the sellers or is there an obligation to permit a cure? Is any kind of deviation of conforming goods a breach of contract? Must the deviation be material? This chapter addresses that topic and others after explaining how the idea of good faith places transactions in a particular context. What if there was an issue of mistake? Remember that at common law, a unilateral mistake may still constitute a binding contract, whereas a bilateral mistake will not. Issues of mistake often raise the corollary issue of unconscionability. In the Case Opener, is the seller of the motor home obligated to provide a perfect vehicle? If not, will the seller be liable? These questions will be addressed in the following discussions on good faith, performance requirements, and the available remedies and warranties that attach to a sale. Good Faith UCC Section 1-304 requires good faith in the performance and enforcement of every contract. Good faith means honesty in fact. When the parties are merchants, the UCC imposes a higher standard. Between merchants, the UCC imposes not only honesty in fact but also reasonable commercial standards of fair dealing. This second requirement is often called commercial reasonableness. In the context of good faith, courts decide the specific obligations of sellers/lessors and

buyers/lessees. The next few sections of the chapter discuss these specific obligations. Page 360 Reconsider the Case Opener. How can you argue that both good faith and commercial reasonableness may be an issue in the transaction? Could an argument be made for a “simple mistake” or immaterial nonconformity as noted in the following Case Nugget? CASE Nugget Do Mistake and Unconscionability Affect the Enforceability of a Contract? Donovan v. RRL Corporation California Supreme Court 26 Cal. 4th 261 (2001) The Donovans showed up at the defendant car dealership. After hearing the sales pitch, Mr. Donovan stated that he’d take the car at the price quoted in the newspaper, $25,995. The horrified salesman said that he could go as low as $37,995 but not $25,995. At that point, Donovan showed the salesman a copy of an ad that had been running in the local newspaper identifying the very same automobile for $25,995. The salesman responded that the advertisement had to be a mistake. Donovan said that he wanted the car at the $25,995 price. He subsequently brought an action in the municipal court in Orange County. The trial court found for RRL Corp. on mistake. However, the California court of appeals reversed, stating that all the material elements of a contract were clearly stated in the advertisement and that Donovan’s acceptance of those terms constituted a good contract. The California Supreme Court heard the case, reversing it on a combination of mistake and unconscionability. The supreme court found that a contract was indeed created but that the contract could be rescinded since the evidence showed that (1) the defendant’s unilateral mistake was made in good faith; (2) the defendant did not bear the risk of the mistake; and (3) the enforcement of a contract with an erroneous price would be unconscionable as a matter of law.

Specific Obligations of Sellers and Lessors LO 16-2 Outline the perfect tender rule. The Perfect Tender Rule The UCC requires sellers and lessors to tender conforming goods to buyers and lessees. UCC Sections 2-503(1) and 2A-508(1) state that tender of delivery requires the seller/lessor to have and hold conforming goods at the disposal of the buyer/lessee and give the buyer/lessee reasonable notification to enable the buyer/lessee to take delivery. Conforming goods are goods that conform to contract specifications. However, Article 49(1) of the CISG allows avoidance (the term used for the buyer’s refusal to accept nonconforming goods) only if there is substantial and foreseeable nonconformity of the goods. In other words, the CISG follows more closely the common law concept of substantial performance than it does the perfect tender rule. In our case opener, are the various leaks in the

motor home a violation or violations of the perfect tender rule? Does it matter how “bad” the leaks are? Is it subject to some kind of sliding scale of seriousness of “leaks”? Page 361 A common law rule known as the perfect tender rule required the seller to deliver goods in conformity with the terms of the contract, right down to the last detail. UCC Sections 2-601 and 2A-509 embrace the perfect tender rule. These sections indicate that if goods or tender of delivery fails in any respect to conform to the contract, the buyer/lessee has the right to accept the goods, reject the entire shipment, or accept part and reject part. Common law usually substitutes perfect tender with the doctrine of substantial performance. Substantial performance occurs when all the material elements of a contract are satisfied even if some nonmaterial requirements may not be satisfied. The perfect tender rule would not recognize the distinction between material and immaterial contractual requirements. The next Case Nugget considers how the perfect tender rule is affected when good faith is an issue. GLOBAL Context Doug Armand/Getty Images Choice of Law: “Religious Laws”? It is a common practice for parties to any contract to indicate in the contract itself which laws will govern the transaction if a dispute arises. For example, if a merchant in Germany purchases goods from a seller in the United States and the goods are in a warehouse in France, the contract may state that the laws of France will govern the contract. It could just as easily state the laws of Germany or the United States. In some situations, the contract could state some other jurisdiction, however remote or tenuous the jurisdiction’s connection may be to the parties or goods. Which laws govern a contract is up to the will of the parties unless the jurisdiction has specific laws that decide the choice of law for the parties regardless of their intent. Hence, it is always important to know the local laws governing transactions. An interesting issue that is starting to arise is whether parties may choose religious laws to govern disputes. For example, may the parties to a contract choose Sharia law, that is, the religious law based on the Koran in the Muslim religion? We’ve not yet seen the use of Sharia law in UCC or CISG contracts, but a Florida trial judge ruled in March 2011 that a dispute regarding the ouster of trustees of a mosque should be determined under Sharia law. The issue raises questions; if, for example, a mediation clause in a contract calls for mediation by canon law, should, or even could, a court adhere to that provision? In our ever-shrinking world, this issue does give one cause for thought. Source: William R. Levesque, “Judge Orders Use of Islamic Law in Tampa Lawsuit Over Mosque Leadership,” Tampa Bay Times, March 21, 2011. CASE Nugget How Does Good Faith Affect Perfect Tender? Y&N Furniture Inc. v. Nwabuoku New York Court of Appeals 734 N.Y.S.2d 392 (2001) The

defendant, Nwabuoku, purchased $1,500 worth of furniture from the plaintiff, Y&N Furniture. Through an arrangement with the plaintiff, the defendant financed the purchase through a financing company named Beneficial. On receipt of the furniture, the defendant was to notify Beneficial that receipt was effected, and Beneficial would pay Y&N the $1,500 purchase price. Nwabuoku would then begin paying Beneficial the amount due plus interest according to their financing agreement. Nwabuoku refused to acknowledge receipt to Beneficial and eventually rejected the goods, claiming that he did not want the furniture. The civil court of the City of New York found that Nwabuoku had rejected the goods, and the court cited the perfect tender rule as requiring “exact performance by the seller.” Moreover, the court held that “rejection of goods must be within a reasonable time of their delivery or tender.” The court indicated that Nwabuoku did indeed make a rightful rejection. However, the court noted that a rejection of goods must be based on some claim that the goods are in some way nonconforming. The defendant in this case had a disagreement over the terms of the financing (though the terms were clearly stated in the financing statements). The defendant made no claim of nonconforming goods. Thus, the court found that “in this case, too, we have a rejection that is not only ‘wrongful,’ but also in bad faith.” A wrongful rejection is not necessarily in bad faith; the buyer may honestly believe that the goods fail to conform but may simply be mistaken. But a rejection that does not even purport to rest on an honest assessment of conformity of the goods has “the effect of destroying or injuring the right of the seller to receive the fruits of the contract.” Page 362 Consider Case 16-1, which provides an illustration of a situation in which the UCC’s version of the perfect tender rule was relevant when compared to the common law rule of material breach under the doctrine of substantial performance. In the Case Opener, does the tender of a motor home with leaks constitute substantial performance under common law and perfect tender under the UCC? What about under the CISG? CASE 16-1 ALASKA PACIFIC TRADING CO. v. EAGON FOREST PRODUCTS INC. Washington Appellate Division 1 933 P.2d 417 (1997) FACTS: Alaska Pacific Trading Company (ALPAC) and Eagon Forest Products Inc. contracted to buy and sell raw logs. ALPAC and Eagon engaged in months of communications about a shipment of 15,000 cubic meters of logs from Argentina to Korea between the end of July and the end of August 1993. The delivery date passed without ALPAC shipping the logs. Eagon canceled the contract, alleging that ALPAC had breached the agreement by failing to deliver. ALPAC alleged that its failure to deliver was not a material breach and that the parties had modified the delivery date. Alternatively, ALPAC argued that Eagon breached the

contract by failing to provide adequate assurances or repudiating the contract. The miscommunication between the parties occurred after the market for logs began to soften, making the contract less attractive to Eagon. ALPAC was reluctant to ship the goods because it was concerned that Eagon might not accept the shipment. However, Eagon never stated that it would not accept the cargo. ISSUE: The question for the court is whether to apply the common law doctrine of material breach or the UCC doctrine of perfect tender. REASONING: In the court's own words: As a contract for the sale of goods, this contract is governed by the Uniform Commercial Code, Article II (UCC II) which replaced the common law of material breach, on which ALPAC relies, with the "perfect tender" rule. Under this rule, "If the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . reject the whole." . . . Both the plain language of the rule and the official comments clearly state that, if the tender of the goods differs from the terms of the contract in any way, the seller breaches the contract and the buyer is released from its duty to accept the goods. DECISION AND REMEDY: The court applied the literal language of the UCC, holding that the perfect tender rule applied and that ALPAC's failure to deliver was a breach of contract. SIGNIFICANCE OF THE CASE: Though difficult to measure at times, the perfect tender rule is a departure from the common law rule of substantial performance. Any deviation from the contract may indeed constitute a breach of the perfect tender rule, materiality notwithstanding. CRITICAL THINKING Here, Eagon got lucky. The company got out of a contract that was unfavorable to it, given the softening market for logs. In what way did the judge simplify the case? Is it fair to say the judge oversimplified the case? ETHICAL DECISION MAKING What ethical norm or value underlies the judge's decision? Explain. Page 363 Exceptions to the Perfect Tender Rule The perfect tender rule is not as inflexible as it appears. Although the rule itself demands perfection, both courts and UCC drafters have created exceptions that reduce the rule's rigidity. These exceptions limit the seller's obligation to deliver conforming goods and/or limit the buyer's power to reject goods that do not conform. The exceptions allow sellers/lessors and buyers/lessees to ask questions such as What are the norms in the particular industry, and/or what past dealings have the parties had with one another? What does the parties' agreement say? Is it possible for the seller/lessor to cure or correct problems? What if the goods have been destroyed? What if nonconformity substantially impairs the value of goods? What if unforeseen circumstances make contract performance commercially impracticable? Norms in the Industry and Past Dealings between the Parties When the buyer alleges that goods failed to conform to contract specifications, the buyer

does not automatically have the right to reject the goods. The UCC requires courts to consider norms in a particular trade. Sometimes, the norms for a particular trade do not permit a buyer to reject goods with minor flaws. UCC Section 1-205(2) defines usage of trade as any practice that members of an industry expect to be part of their dealings. In addition to its requirement on usage of trade, the UCC requires courts to consider the ideas of course of dealing and course of performance. UCC 1-205(1) defines course of dealing as previous commercial transactions between the same parties. Under UCC 208(1), course of performance refers to the history of dealings between the parties in the particular contract at issue. Exceptions Outlined in the Parties' Agreement Sometimes, language in the parties' agreement limits the rigidity of the perfect tender rule. For instance, parties may agree that the seller must have the opportunity to repair or replace nonconforming goods within a particular period of time. Alternatively, parties may agree with a level of performance that is less than perfect. They could indicate, by agreement, the expectation regarding performance. LO 16-3 Define the right to cure. The Seller's and Lessor's Right to Cure Under UCC Sections 2-508 and 2A-513, sellers and lessors have the right to cure or fix problems with nonconforming goods. In particular, sellers and lessors can repair, adjust, or replace defective or nonconforming goods as long as they give prompt notice of the intent to cure and then cure within the contract time for performance. Destroyed Goods Under UCC Sections 2-613 and 2A-221, if goods are identified at the time the parties entered into a contract and the goods are destroyed through no fault of the parties before risk passes to the buyer or lessee, the parties are excused from performance. If the goods are only partially destroyed, the buyer can inspect the goods and decide whether to (1) treat the contract as void or (2) ask the seller for a reduction of the contract price and then accept the damaged goods. Substantial Impairment Two sections of the UCC use the concept of substantial impairment to modify the perfect tender rule. The first applies when a buyer revokes acceptance of goods. UCC Section 2-608 indicates that a buyer who has accepted goods may later revoke the acceptance only if the buyer can show that the defects substantially impair the value of the goods. The second applies when the buyer and seller have entered into an installment contract. UCC 2-612(2) and 2A-510(1) indicate that a buyer/lessee may reject an installment of a particular item only if the defects substantially impair the value of the goods and cannot be cured. Page 364 LO 16-4 Define commercial impracticability. Commercial Impracticability UCC Sections 2-615(a) and 2A-405(a) state that a delay in delivery or nondelivery, in whole or in part, is not a breach in circumstances in which performance has been made impracticable because

a contingency has occurred that was not contemplated when the parties reached an agreement. For example, this rule would be relevant if a change in government regulation that neither party contemplated forbids the import or export of a particular item the parties had agreed would be shipped.

Specific Obligations of Buyers and Lessees The Basic Obligation: Inspection, Payment, and Acceptance Under UCC Sections 2-301 and 2A-516(1), buyers and lessees are obligated to accept and pay for conforming goods in accordance with the contract. Before paying for and accepting the goods, buyers/lessees ordinarily inspect the goods to make sure they conform to the specifications in the parties' agreement. Exceptions to the Basic Obligation Buyers/lessees do not always end up accepting and paying for goods. Sometimes, on inspection, the buyer or lessee decides to reject the goods and refrain from paying for them. In this section, we take a look at exceptions to the buyer's/lessee's basic obligation. These exceptions allow sellers/lessors and buyers/lessees to ask questions such as What forms of payment are allowed under the UCC? In what circumstances can a buyer reject goods? Is the buyer allowed to accept part but not all of the goods? In what circumstances can a buyer revoke acceptance of goods? How and when can a buyer reject nonconforming goods? Are installment contracts treated differently than other kinds of contracts? Problems on Inspection If all goes well in a transaction over the sale or lease of goods, the buyer or lessee inspects the goods and then pays by any means the parties have agreed on, including payment by cash, check, or credit card. Unless the parties have agreed otherwise, the buyer or lessee typically inspects the goods before paying. Under UCC Sections 2-513(1) and 2A-515(1), the seller or lessor must provide an opportunity for inspection before enforcing payment. The concept of reasonableness governs the inspection process. For example, inspection must take place at a reasonable time and place, in a reasonable way. Once the buyer or lessee inspects the goods, he or she decides whether to accept them. Sometimes, on inspection, the buyer or lessee decides not to accept the goods. Problems with Acceptance When all goes well, UCC Sections 2-606(1) and 2A-515(1)(a) indicate that the buyer or lessee, after inspecting, signifies agreement to the seller or lessor that the goods are either (1) conforming or (2) acceptable even though they are nonconforming. UCC 2-602(1), 2-606(1), and 2A-515(1)(b) allow the seller or lessor to presume acceptance if the buyer or lessee fails to reject the goods within a reasonable period of time. UCC 2-601(c) and 2A-509(1) allow the buyer or lessee to make a partial acceptance when the goods are nonconforming and the seller

or lessor has failed to cure the defects. When goods are nonconforming, the buyer or lessee is allowed to revoke or withdraw acceptance of the goods. The previous section on specific obligations of sellers/lessors discussed this concept under the topic of substantial impairment. From the buyer's/lessee's perspective, the buyer or lessee may revoke acceptance if the nonconformity substantially impairs the value of the goods, but only if he or she had a legitimate reason for the initial acceptance.

Warranties LO 16-5 Define implied warranties of title, merchantability, and particular purpose. At common law, the obligations and responsibilities of the contractual parties are determined by the express terms of the contract. UCC contracts are the same but with a major addition: implied warranties. Implied means that the warranty or guarantee is automatically part of the contract; the parties do not negotiate for it. At common law, the only implied warranty in a contract is the implied warranty of assignability. However, the UCC changes this part of contract law dramatically. Let's look at the whole range of warranties in contract law. Warranties generally arise in conjunction with a sale or lease. They impose certain duties on the seller or lessor, and if the seller or lessor fails to live up to these duties, he or she may be sued for breach of warranty. There are three basic categories of warranties: warranties of title, express warranties, and implied warranties. Each is discussed in the following sections. Warranties of Title Although no warranties automatically arise under the common law, the UCC assumes that the seller Has good and valid title to the goods Has the right to transfer title free and clear of any liens, judgments, or infringements of intellectual property rights of which the buyer does not have knowledge. The UCC specifically permits buyers to recover from sellers who have breached these warranties of title. The only exceptions to title warranties occur if they are disclaimed or modified by specific language in the contract or if the seller is obviously unable to guarantee title, as would be the case, for instance, at a sheriff's sale of seized goods. Clearly, if the buyer is aware of any problem with the transfer of goods, the buyer is indeed purchasing them at their own risk. Still, if the seller transfers goods to an unknowing buyer for which no good title passes or on which there are encumbrances or patent claims, the buyer may treat the contract as being in breach. Under such circumstances, the buyer may then avail themself of the remedies available under a breach situation. Express Warranties Although the common law does not use the

term express warranties, the concept and its application do exist in the common law. It seems only fair and equitable that promises made by a seller to induce a buyer to execute a sales contract should be enforceable. An express warranty is any description of a good’s physical nature or its use, in either general or specific circumstances, that becomes part of the contract. To use common law language, an express warranty is a material term of the sale or lease contract. Express warranties may be found in advertisements or brochures (e.g., “This electric saw comes with a lifetime guarantee”). Such a warranty may also be part of a written sales or lease contract; or it may be a salesperson’s oral promise concerning the good, made while he is attempting to close the deal. A sample or model may also provide an express warranty. Generally speaking, if the buyer relies on representations, those representations become part of the contract in the form of express warranties. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let’s say that in the Case Opener, the seller says that all the windows had been sealed with an all-purpose sealant? What kind of a statement is this: express or implied? Alternatively, what if the seller said that as far as he knew there had never been any leaking issue with this vehicle? What does this statement qualify as? Which statement is an express warranty? Page 366 Implied Warranties of Quality Implied warranties arise by operation of law under certain circumstances. Earlier, you read about the implied warranties of title that arise under the UCC. This section focuses on the three warranties of quality that arise under the UCC. Implied Warranty of Merchantability Consider the following scenario: You purchase a toaster from a local discount store. When you use the toaster, all you get is either burnt toast or bread that is only slightly warm. You take the toaster back to the store and are met with this answer: “Well, we don’t guarantee how well the toaster will work. After all, it does toast, either very, very lightly or very, very burnt.” This answer, of course, is nonsense. There is a reasonable expectation of how a toaster will perform. That reasonable expectation is codified in the UCC implied warranty of merchantability. To invoke this implied warranty, the buyer or lessee must have purchased or leased the good from a merchant. Thus, a dirt bike purchased at a bicycle shop is covered by the warranty of merchantability, but a bike that is bought from a neighbor is not, unless the neighbor is a bicycle merchant. Under the UCC, the goods must be merchantable, meaning that they must Be able to pass without objection in the trade or market for similar goods. In the case of fungible goods, be of fair average quality within the description. Be fit for the ordinary purposes for which such goods are used. Be produced, within the variations permitted by the agreement, with even kind, quality, and quantity

in each unit and among all units involved. Be adequately contained, packaged, and labeled as the agreement may require. Conform to the promises or affirmations made on the container or label, if any. Consider the following case and especially its relationship to the COVID-19 pandemic. CASE 16-2 IMPLIED WARRANTY OF MERCHANTABILITY Adel v. Greensprings of Vermont, Inc. 363 F. Supp. 2d 692 (D. Vt. 2005) After returning from a skiing vacation in Vermont, Leslie Adel came down with Legionnaires' disease. He claimed it was from the water drunk at the ski resort and provided by Greensprings of Vermont Inc. The novel questions presented are: (1) is water a good under the UCC Article 2 or a service of “providing water”?; (2) if it is a good and falls under UCC Article 2, does this situation fall under the application of the implied warranty of merchantability? The court first succinctly laid out the pertinent and compelling facts: Together with their two children and eight friends, Leslie and Joanne Adel went on a ski vacation in southern Vermont from February 3 through February 7, 1999. The vacationers stayed in Unit 24 at Greenspring. Greenspring is a townhouse condominium owned by Thomas and Charlene Fallarco. The townhouse condominium is part of a larger complex developed by defendant Greensprings. Greensprings owns and maintains the water supply for the Greenspring condominiums. Greensprings also owns and maintains common areas of the complex such as a swimming pool and spa at the Greenspring recreation center. While he was in Vermont, Leslie Adel ("Adel") used the swimming pool and spa at the Greenspring recreation center as well as the bathrooms, showers, and a bathtub jacuzzi in Unit 24. On February 9, 1999, two days after he returned from his ski vacation, Adel began to experience flu-like symptoms. Unfortunately, his condition steadily worsened and he was transferred to the Hospital of the University of Pennsylvania on February 16. On February 17, a physician took a sputum specimen from Adel's lungs. The hospital laboratory cultured Legionella pneumophila from that specimen on February 23. As a result, Adel was diagnosed as suffering from Legionnaires' disease. Adel was hospitalized at the Hospital of the University of Pennsylvania for six weeks. His bout with Legionnaires' disease was serious and included 45 days in a coma. Adel claims to have suffered permanent injuries as a result of contracting Legionnaires' disease. On February 23, 1999, Nancy Thayer of the epidemiology division of the Vermont Department of Health ("DOH") received a report that Adel had Legionnaires' disease. Ms. Thayer began an investigation into the possible sources of Adel's illness. The primary means of transmission of Legionnaires' disease is the inhalation of aerosolized water droplets containing the Legionella pneumophila bacteria. The incubation period for Legionnaires' disease is usually between 2 and 14

days. Thus, Adel's Vermont vacation fell within the potential incubation period. In addressing the first question, the court opined and held that water is indeed a good under UCC Article 2: The Vermont Supreme Court has not decided whether a water supplier is a "seller" of a "good" under Vermont's version of the UCC. This Court must therefore predict how the Vermont Supreme Court would rule if it were faced with this question. . . This is a difficult task as decisions from other state courts are divided. Nevertheless, the Court is persuaded by the reasoning of those decisions finding that water suppliers are sellers of goods under Article 2 of the UCC. As to the second issue of the applicability of the implied warranty of merchantability, the court ruled The situation is less clear when we turn to the question of whether water suppliers can be held liable for a breach of the warranty of merchantability. The issue is complicated by the fact that two courts have held that, even though the furnishing of water is covered by the UCC, the warranty of merchantability does not apply... This Court rejects [this] approach... If the furnishing of water is covered by Vermont's version of the UCC then the warranty of merchantability should apply. The statute clearly states that "[u]nless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Thus, if a seller of water is a merchant with respect to water, there is an implied warranty. The statute provides no basis to grant a special exemption for sellers of water. CRITICAL THINKING Let’s apply the court’s rationale to the COVID-19 vaccinations. Your local clinic administers the vaccine to you. It turns out that the batch was a bad one and instead of vaccinating you, you are infected. Using the Adel case above, what factors would convince you that the clinic is liable? Is it a “merchantability” situation. Would a vaccine be considered a “good” under the UCC? ETHICAL DECISION MAKING It seems that the court in the Adel case might have been treating the application of the implied warranty similarly to a strict liability in tort case. Should some kind of fault or wrongdoing have to be proven to hold Greensprings liable? Is it ethical to conclude that since someone has been injured, then someone has to pay, regardless of fault? Page 367 Implied Warranty of Fitness for a Particular Purpose Another important UCC implied warranty is the implied warranty of fitness for a particular purpose. This warranty comes about when a seller or lessor knows or has reason to know (1) why the buyer or lessee is purchasing or leasing the goods in question and (2) that the buyer or lessee is relying on him or her to make the selection. Under this warranty, a seller or lessor does not have to be a merchant. An implied warranty of fitness for a particular purpose should not be confused with an express warranty. If the buyer walks

into a store and the salesclerk says, “This saw will cut through metal,” the seller has created an express warranty. However, if the buyer comes into the store and asks the salesclerk for a saw to cut through some copper tubing and the salesclerk refers the customer to a wall of different saws, it is reasonable for the buyer to assume that all the saws on the wall will satisfy the particular purpose that the buyer has indicated. Thus, an implied warranty of fitness for a particular purpose has been created. Implied Warranty of Trade Usage The UCC, always diligent in its goal to facilitate the flow and ease of commercial activity, recognizes that a well-accepted course of dealing or trade usage may create implied warranties dependent on the circumstances. For example, if it is generally accepted in the trade that a certain product is always preassembled and shrink-wrapped, the failure of the seller to deliver the goods in that condition would be a breach of the implied warranty of trade usage.

Warranty Rights of Third Parties LO 16-6 Recognize the issues around third parties and warranties The idea of a seller being in breach of an implied warranty raises an entirely new issue: Is the seller liable to anyone other than the buyer? This question may initially sound peculiar. After all, the seller and the buyer are bound together by contract and if either breaches, then the breaching party is liable to the nonbreaching party. However, consider this possible scenario: Jane buys a blender from a local store. Prior to using the blender, she lends it to her cousin Valerie to use at a party. While Valerie is blending drinks at the party, the blades fly off the blender and injure her. What obligation, if any, does the seller have to the injured Valerie? No contractual relationship exists between Valerie and the seller. However, it seems to be patently unfair to conclude that Valerie has no cause of action against the seller. The UCC recognizes this unfairness and clearly states that Valerie may indeed have a cause of action based on breach of warranty against the seller. The states are given the following three choices regarding third-party beneficiaries of warranties: Seller’s warranties extend to the buyer’s household members and guests. Seller’s warranties extend to any reasonable and foreseeable user. Seller’s warranties extend to anyone injured by the good. Most states have adopted the first option, which was the original UCC provision. Only a handful of states have adopted the second or third options.

Warranty Disclaimers and Waivers LO 16-7 Describe what a warranty disclaimer is, and why it is used. There really is no question of whether an implied warranty may be disclaimed. The real question is how it is to be disclaimed. Generally speaking, if an implied warranty is to be disclaimed, the seller must do so in clear, unambiguous, conspicuous language. To disclaim the implied warranty of fitness for a particular purpose, the seller must disclaim the warranty in writing. The seller may disclaim the warranty of merchantability either orally or in writing; some states require the term merchantability to be used in the disclaimer. Under the CISG, however, the term merchantability does not need to be specifically expressed to disclaim it. Any reasonable language disclaiming the warranty is acceptable. CASE Nugget Implied or Express Warranty? Old Mexican Foods, Inc. v. Hanson Staple Company 285 Ga. 288; 676 S.E.2d 169 (2009) Old Mexican Foods contracted with Hanson Staple Company to purchase made-to-order packaging material. Old Mexican Foods refused the shipment, claiming that the packaging material failed to meet quality expectations and breached the implied warranties of merchantability and particular purchase. Litigation followed and the parties reached a settlement agreement for Old Mexican Foods to purchase a minimum amount of the packaging material. Hanson moved for a court order instructing Old Mexican Foods to purchase the minimum amount of packaging agreed upon in the settlement agreement, subject to the UCC standards of the implied warranty of particular purpose. Old Mexican Foods complied and ordered the minimum amount under the settlement agreement. Once again, Old Mexican Foods claimed that the packaging material failed to meet their quality expectations under the implied warranties of merchantability and particular purpose. Old Mexican Foods refused Hanson’s demand for payment on the invoice. Hanson sued on the invoice. This seems fairly straightforward. However, the Georgia Supreme Court had other ideas. Agreeing with the court of appeals, the Court questioned the purpose of the settlement agreement: Was it created as a contract for the sale of goods under UCC article 2, or was it created predominantly for the purpose of settling the first lawsuit? The court opined that since the original lawsuit was for an amount over $260,000, the settlement agreement requiring Old Mexican Foods to purchase only $130,000 meant that the predominant nature of this mixed settlement agreement did NOT fall under the UCC but under common law. As such, no implied warranties are present. The court held “If [Old Mexican Foods] had desired a warranty as to the quality of the [packaging], it could have bargained for inclusion of one in the agreement, having chosen to forego an express warranty during the contract negotiations, it must now live with the

consequences.” Page 369 To avoid potential liability, a seller of corn for feed, for example, might decide to include in any sales contract for feed corn a clause that states, “No guarantees are made, either expressly or implied, that this feed corn has not been contaminated by mold or the toxin Fumonisin. Buyer is advised to test the corn to determine the presence of these potential contaminants.” Of course, such a disclaimer might certainly have a negative impact on the sales of one’s product. The buyer may also waive both implied and express warranties. A buyer may waive these rights by (1) failing to examine goods for which an express warranty was created by a sample or model or (2) failing to comply with the seller’s request to inspect the goods. Suppose, for example, that a printer asks the buyer to come into the shop to proof letterhead and envelopes. The buyer refuses, claiming that they are too busy, and tells the printer to go ahead and run the stationery. On receipt of the stationery, the buyer discovers that the numbers in the phone number are transposed, making the stationery useless. Unfortunately, the buyer has indeed waived his rights due to his failure to inspect. A buyer may also waive their warranty rights under the contract by failing to comply with the statute of limitations. Under the UCC, the buyer or seller must bring a lawsuit on a breached contract within four years of when the breach occurred or when the nonbreaching party became aware of it. The buyer and seller are free to negotiate contractually a shorter time period (as long as it is not less than one year), but they are not free to negotiate a time period longer than the four years. Although the UCC remains the primary codification of both state and federal laws regarding sellers’ warranties, there has also been specific legislation pertaining to this issue. The 1975 federal law known as the Magnuson–Moss Act requires that if a seller decides to issue a written warranty for a consumer good (the seller is not required to do so), the seller must indicate whether that warranty is a full warranty or a limited warranty. This applies to any consumer good sold for more than $10. If the written warranty is silent, it is presumed to be a full warranty, which means that if the good fails or is defective, the good or its defective part will be replaced. If replacement cannot be timely effected, the buyer has the right to a refund or a full replacement. Page 370 If the good is sold for more than $15, the written warranty must disclose a number of items of information—names and addresses of the warrantors, any limitations on the warranty, and the procedures required to activate the warranty remedies—all in readable and easily understood language, in other words, not in legalese. MAGNUSON-MOSS ACT The Magnuson–Moss Warranty Act (P.L. 93-637) is a United States federal law (15 U.S.C. § 2301 et seq.). Enacted in 1975, the federal statute governs warranties on consumer

products. The law does not require any product to have a warranty (it may be sold “as is”), but if it does have a warranty, the warranty must comply with this law. If a full warranty is provided, that warranty must contain the following provisions: “Under a full warranty, in the case of a defect, malfunction, or failure to conform with the written warranty, the warrantor can remedy the consumer product within a reasonable time and without charge; may not impose any limitation on the duration of any implied warranty on the product; may not exclude or limit consequential damages for a breach of any written or implied warranty on the product, unless the exclusion or limitation conspicuously appears on the face of the warranty; and if the product, or a component part, contains a defect or malfunction, must permit the consumer to elect either a refund or replacement without charge, after a reasonable number of repair attempts. In addition, the warrantor may not impose any duty, other than notification, upon any consumer, as a condition of securing the repair of any consumer product that malfunctions, is defective, or does not conform to the written warranty. However, the warrantor may require consumers to return a defective item to its place of purchase for repair.” Nothing in the Magnuson–Moss Act prohibits a seller from disclaiming or limiting warranties, express or implied, provided clear and conspicuous language is utilized.

The Goal of Contract Remedies Of course, laying out these various contractual obligations gives rise to the question of what remedies are available if those obligations are breached. The obligations of sellers/lessors and buyers/lessees are determined by (1) terms the parties outline in agreements, (2) custom, and (3) rules outlined by the Uniform Commercial Code, such as the various implied warranties described previously.

Remedies Available to Sellers and Lessors under the UCC Cancel the Contract UCC Sections 2-703(f) and 2A-523(1)(a) allow a seller or lessor to cancel the contract if the buyer or lessee is in breach. The UCC requires sellers/lessors to notify buyers/lessees of the cancellation. Then the seller or lessor pursues remedies available under the UCC. Remember, these remedies give the seller/lessor the benefit of the bargain and no more. Withhold Delivery Sometimes a buyer breaches the contract or lease before the seller has delivered the goods. For instance, the buyer or lessee might fail to pay according to the terms of the agreement. UCC Sections 2-703(a) and 2A-523(1)(c) allow sellers or lessors to withhold delivery of goods when the

buyer or lessee is in breach. Page 371 Resell or Dispose of the Goods Sellers or lessors are also allowed to resell or dispose of the goods when the buyer is in breach and the goods have not yet been delivered. The seller or lessor then holds the buyer or lessee liable for any loss. UCC Section 2-706 allows the seller to recover the difference between the resale price and the contract price, plus incidental damages and minus expenses saved. Although buyers are liable for these damages, the seller gets to keep any profits it makes on the resale. UCC 2A-527(2) outlines a similar rule for lease agreements. The lessor is allowed to lease the goods to another party and recover unpaid lease payments and any deficiency between the lease payments due under the original lease contract and those due under the new contract. The lessor can also seek incidental damages. Sue to Get the Benefit of the Bargain In trying to give the seller or lessor the benefit of the bargain, and nothing more, courts often grant damages to recover the purchase price or lease payments due. Stop Delivery UCC Sections 2-705(1) and 2A-526(1) allow a seller or lessor to stop delivery of goods that are in transit. In transit means that the seller or lessor has delivered the goods to a carrier or bailee but the carrier or bailee has not yet turned them over to the buyer. Of course, the seller/lessor must give timely notice to the carrier/bailee so that the carrier/bailee is able to stop delivery. Also, the rules are different for insolvent and solvent buyers and lessees. If the buyer/lessee is insolvent, the carrier/bailee can stop delivery regardless of the quantity shipped. If the buyer/ lessee is solvent, however, the carrier/bailee can stop delivery only if the quantity shipped is a large shipment (e.g., a carload or truckload). Reclaim the Goods Under UCC Sections 2-709(1) and 2A-529(1), if the buyer or lessee has possession of the goods and is in breach, the seller or lessor can sue for the purchase price of the goods or for the lease payments due, plus incidental damages. In some circumstances, the UCC allows the seller or lessee to reclaim the goods. UCC 2-702(2) allows a seller to reclaim goods when the seller discovers the buyer is insolvent. UCC 2A-525(2) allows a lessor to reclaim goods when the lessee fails to make payments according to the lease terms.

Remedies Available to Buyers and Lessees under the UCC Cancel the Contract Sometimes, sellers or lessors fail to deliver the goods or to deliver conforming goods and thus are in breach. UCC Sections 2-711(1) and 2A-508(1)(a) allow buyers and lessees to cancel the contract and then seek remedies that give them the benefit of the bargain. Obtain Cover LO 16-8 Describe the concept of cover and resale. Under UCC Sections 2-712 and 2A-

518, buyers and lessees are allowed to cover, or substitute, goods for those due under the sales or lease agreement. The buyer must (1) demonstrate good faith in obtaining the substitute goods, (2) pay a reasonable amount for the substitute goods, (3) act without unreasonable delay in purchasing the substitute goods, and (4) purchase goods that are reasonable substitutes. Page 372Page 373 Sue to Recover Damages LO 16-9 Recall the money damages that are available for breach of contract Buyers and lessees, are entitled to incidental and consequential damages. Consequential damages include damages for lost profits as long as these damages are not too speculative. These monetary damages give the injured buyer or lessee the benefit of the bargain. There is also the availability of liquidated damages and even, under some situations, punitive damages. How does one differentiate between direct and consequential damages. Consider the following case. CASE 16-3 STERN OIL CO. v. BROWN 2018 S.D. 15 908 N.W.2d 144 (2018) FACTS: Stern Oil is a fuel and petroleum distributor based in Freeman operated by Scott and Staci Stern and Scott's father, Gillas. The business supplies fuel at locations across the Midwest. Brown is a businessman from Gettysburg. Brown operates two convenience stores in North Sioux City, South Dakota: Goode to Go and Freeway Mobil. In 2005, Brown and Stern Oil entered into two 10-year Motor Fuel Supply Agreements (MFSAs) for Stern Oil to supply ExxonMobil branded fuel to Brown to sell at his two convenience stores. The MFSAs required Stern Oil to sell and deliver up to a contractually determined "Maximum Annual Volume" of fuel to Brown. Brown was obligated to purchase at least 75 percent of that amount annually. Approximately a year and a half into the 10-year agreements, Brown stopped purchasing fuel from Stern Oil. Stern Oil sued Brown for breach of contract. Brown counterclaimed and asserted that Stern Oil fraudulently induced him to enter into the MFSAs by verbally guaranteeing Brown a five-cent profit on each gallon of fuel sold at his convenience stores. Brown also asserted defenses to the validity of the MFSAs. The circuit court granted Stern Oil's motion for summary judgment on its claims for breach of contract and on Brown's fraud claims. The parties waived a jury on the issue of damages, and the case proceeded to a bench trial in October 2009 and January 2010. The circuit court awarded Stern Oil lost profits in the amount of $925,317. ISSUE: Whether the circuit court erred in instructing the jury that Stern Oil's damages had to be foreseeable to Brown. REASONING: Stern Oil argues that lost profits resulting from an immediate payment discount given by ExxonMobil were recoverable as direct damages and not as consequential damages, and as such, the damages were not subject to a foreseeability requirement. Brown contends that any profits arising from the

discount received from ExxonMobil were consequential to the breach of the MFSAs because they were based upon a third-party contractual agreement between Stern Oil and ExxonMobil. Brown was not a party to that agreement and claimed he was not aware of its terms. He maintains the jury was properly instructed. In the alternative, Brown claims that if an error occurred, it was harmless. Because Stern Oil established the factual basis to seek lost profits as the alternative measure of damages, the remaining question is whether the circuit court erred in instructing the jury on consequential damages and the foreseeability of Stern Oil's lost profits to Brown at the time of contracting. The UCC does not distinguish between direct and consequential damages for lost profits claimed by a seller. . . Where the UCC is silent, SDCL 57A-1-103 allows other "principles of law and equity" to supplement the UCC's provisions. Because the UCC does not address when lost profits are direct or consequential, we apply general contract law in determining this question. This Court has stated that "the ultimate purpose behind allowance of damages for breach of contract is to place the injured party in the position he or she would have occupied if the contract had been performed, or to 'make the injured party whole.'" The amount of recovery may not exceed the amount the plaintiff would have gained if the contract had been fully performed. This Court has allowed a party to recover lost profits for breach of contract. In general, to prove damages for lost profit, a plaintiff must establish "a reasonable relationship between the method used to calculate damages and the amount claimed." Damages must also be "reasonably certain and not speculative." Id. Further, we have required that damages be a direct consequence of the breach of contract and reasonably within the contemplation of the parties at the time of making the contract. To this end, "[c]onsequential damages must be reasonably foreseeable by the breaching party at the time of contracting." We have not, however, had an occasion to address the distinction between lost profits as direct or consequential damages. A number of courts have wrestled with this question. DECISION AND REMEDY: The lost profits claimed by Stern Oil are direct damages, not consequential damages. We require a nonbreaching party to show that consequential damages were foreseeable to the breaching party at the time of the contracting. In contrast, direct damages for breach of contract do not have an element of foreseeability because they are, by their very nature, foreseeable by the parties at the time of contracting. Because the lost profit damages flowed directly from the MFSAs, Stern Oil did not have an obligation to show foreseeability. SIGNIFICANCE OF THE CASE: This case illustrates the limits to which damages may be assessed against a breaching party. Clearly lost profits are not just consequential but are direct

and foreseeable damages under any kind of breach and foreseeability need not be proven by the plaintiff. CRITICAL THINKING Can you envision a situation where lost profits are not foreseeable? What if the buyer is not an obvious merchant? A home baker orders a supply of cake ingredients for her home bakery business. The seller fails to deliver the correct supplies and the home baker loses a number of lucrative wedding cake customers. The supplier had no idea it was dealing with a commercial baker but thought the delivery was a home delivery. Should lost profits be recoverable? ETHICAL DECISION MAKING Following up on the critical thinking issue above, should it make a difference at all whether a buyer or seller is a merchant or not. Should a merchant beheld to a higher standard? If the seller above was a neighbor from whom our home baker were buying supplies from and who subsequently breached, should the neighbor be liable for lost profits? Liquidated damages are damages identified before the breach occurs. The parties are free to negotiate, as part of the contract, a liquidated-damage clause in which the parties agree in advance what the damages will be for each party if a breach occurs. Generally speaking, a court will enforce a liquidated-damage clause as long as it is not so far out of reasonable range as to be punitive in nature. Liquidated-damage clauses that are deemed punitive in nature are not enforceable. The topic of exactly how to compute damages is one that has eluded specific definition at times. See the following Case Nugget for an excellent step-by-step explanation of such a computation. The code provides for liquidated damages if the parties have not expressly negotiated a liquidated-damage clause. UCC Section 2-718 pertains to liquidated damages and allows the nonbreaching seller to claim against a breaching buyer 20 percent of the purchase price or $500, whichever is less, as liquidated damages. Although the UCC does not mention the availability of punitive damages, other than in its voiding of liquidated damages that are punitive in nature, an issue that remains unsettled is the awarding of punitive damages against a breaching party who intentionally or egregiously breaches the contract. You will remember from tort law that when a tort is committed either intentionally or recklessly, the court may infer legal malice and instruct a jury that it may consider the awarding of punitive damages in addition to compensatory damages. Although this concept is well settled in tort law, it has never been widely applied in contract law. Yet some argue that it should be, especially to deter intentional breaches of contract. See the Point/Counterpoint at the end of this chapter for two perspectives on this issue. Recover the Goods UCC Sections 2-502 and 2A-522 allow buyers and lessees to recover the goods identified in the contract if the seller or lessor becomes insolvent within 10

days after receiving the first payment due under the agreement. Buyers or lessees are obligated to pay the remaining balance according to the terms of the agreement. Page 374 Obtain Specific Performance UCC Sections 2-716(1) and 2A-521(1) allow buyers and lessees to seek the remedy of specific performance when either (1) the goods are unique or (2) a remedy at law is inadequate. Specific performance usually requires the seller or lessor to deliver the particular goods identified in the contract. CASE Nugget How to Compute Hot Damages Detroit Radiant Products Company v. BSH Home Appliances Corporation United States Court of Appeals for the Sixth Circuit 473 F.3d 623; 2007 U.S. App. LEXIS 300; 2007 FED App. 0005P (6th Cir.); 61 U.C.C. Rep. Serv. 2d (Callaghan) 701 (2007) Detroit Radiant is a manufacturing company that makes gas-fired infrared heaters that are used for industrial and commercial purposes. BSH requested a price quote based on an estimated annual usage of about 30,000 units. Two purchase orders were sent from BSH to Detroit Radiant on August 10, 2001, and January 8, 2003, for 15,000 and 16,000 units, respectively. BSH provided release schedules to Detroit Radiant for exact timing of the order. On April 5, 2004, BSH had received 12,886 units, had not contested quality at any point, and had scheduled 6,000 more units to be delivered before February 2005. On April 12, a new schedule was released, slowing production schedules. On June 24, Detroit Radiant filed a suit for the profits relating to 18,114 unsold units and unsellable inventory. BSH contended both that the purchase orders were estimates and that the 2003 order superseded the 2001 order. The 2001 order was a blanket order, which BSH claims is an industry standard, meaning estimated order. An unsigned supplier argument stated that all scheduled orders were nonbinding forecasts. On March 1, 2006, a district court ruled in favor of Detroit Radiant, claiming that the purchase orders were of a certain quantity and did not contain any language to infer that it was estimated. Michigan, like 49 of the 50 states (except Louisiana), has adopted UCC Article 2 to regulate the sale of goods. The default measures of damages under breach of contract are contract price less the market price of items in the time and place, plus any incidental damages. However, “lost profits” is available in two situations, one of which is a “lost volume seller,” which Detroit Radiant is not and does not claim to be in the case. The other situation occurs when the default measure does not adequately make the seller whole. This could be a result of no reliable market price. In this case, the part is a special order for BSH, but that does not in it itself make the products unsellable. However, BSH would not have allowed the products to be sold because it considered the part proprietary. The BSH argument in court was that Detroit Radiant did not respect the proprietary nature of the

items because it had listed them in a catalog. However, the court found that did not in it itself prove that Detroit Radiant did not consider the part proprietary property of BSH. Detroit Radiant may have just simply been attempting to show the types of parts that it could make. Further, BSH had no proof that it had actually sold any of these units. Thus, Detroit Radiant had shown that there was no reliable market value for the part outside of BSH. Therefore, Detroit Radiant is entitled to lost profits in addition to the value of unsellable inventory that it now has. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? What if the motor home was never “fixable.” Could the buyers sue for lost vacation time, emotional distress, replacement costs for a loaner motor home? What are reasonable consequential damages? What would be unreasonable? Page 375 E-Commerce and the Law Computer Contracts Sometimes, computer purchasers are surprised to find out they are bound to agreements that were created when sellers included contracts in the box in which the computer was delivered. Some of these agreements limit the purchaser’s remedies. For instance, in Hill v. Gateway 2000,* Hill purchased a computer from Gateway 2000 by placing a telephone order. The computer arrived through the mail. Gateway had placed a contract in the computer’s shipping box that indicated that the terms sent in the box were binding on the buyer unless the buyer returned the computer within 30 days. One of the terms in this contract was a provision that stated that any disputes between the parties would be resolved through arbitration. The order taker had not read any of the terms of the contract over the telephone when Hill placed the order. When the computer arrived, Hill did not read the contract. In an effort to avoid the arbitration clause, Hill asked the court to determine that Gateway 2000 could not limit buyers’ remedies or avenues through which they seek remedies (i.e., through arbitration) by bundling hardware and legal documents. The court ruled that the contract was binding on the parties. The court stated, “A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.”† Reject Nonconforming Goods UCC Sections 2-601 and 2A-519 allow the buyer or lessee to reject nonconforming goods. The buyer or lessee may then obtain cover or cancel the contract. Revoke Acceptance of Nonconforming Goods UCC Sections 2-608 and 2A-517 sometimes allow the buyer or lessee to revoke acceptance of nonconforming goods. Accept the Nonconforming Goods and Seek Damages Under UCC Sections 2-607, 2-715, and 2A-519, buyers or lessees are allowed to accept nonconforming goods and then seek monetary damages to give them the benefit of the bargain. The buyer or lessee must give the seller or lessor reasonable notice of the defect.

Modifications or Limitations to the Remedies Otherwise Provided by the UCC Parties to sales and lease contracts are allowed to modify or limit remedies. Under UCC Sections 2-719 and 2A-503, parties are allowed to create agreements that make it clear that the remedies outlined in the agreement are exclusive remedies. Courts uphold modifications or limitations to remedies unless the remedies fail in their essential purpose. Page 376 CASE OPENER WRAP-UP A Nightmare of a Vacation Plaintiffs sought damages under the following theories: revocation of acceptance, pursuant to of the Magnuson–Moss Warranty Act (Magnuson–Moss Act), breach of implied warranty of merchantability, pursuant to of the Magnuson–Moss Act; and revocation of acceptance and cancellation of contract. They also sought to recover the purchase price. Plaintiffs attached the following documents to their complaint: (1) the first page of the parties' contract for the sale of the RV, an alleged expert's report regarding water leakage and mold, (3) the letter to defendant purporting to confirm the revocation of acceptance, and (4) rental rates for a 23-foot trailer. Issues Clearly the purchase of a recreational vehicle is a purchase of a "good" under the Uniform Commercial Code's Article 2. However, the following issues are presented: Are the issues with the RV "nonconforming" defects rising to a breach of contract? Do the plaintiffs have an obligation to allow the defendants to cure the defects? If so, is there a limit to the amount of time given to affect a cure? May the plaintiff's revoke their acceptance and demand their purchase price back? Have the contractual warranties been breached? In short, the court states these answers to the following questions: Yes, these are non-conforming defects Yes A reasonable amount—usually determined by a jury Yes, but ONLY after a reasonable time has been given for a cure Yes, same as question #1, but only after a reasonable time The court found there were two instances of nonconforming issues. The first one, dealing with leaking into the dinette area, had been remedied, at least to some degree. When the leaking reappeared in greater force, the court treated it as a new breach. While the RV had been sent to the manufacturer for repair, the owners revoked acceptance and demanded their purchase price back. The plaintiff claims that the unreasonable time for the cure should be calculated from the first leak's appearance. The court agreed with the defendants that the first leak's issue was satisfied and a new clock began running with the appearance of the second, more serious leak. Since it had only been two weeks since the second leak was reported, a reasonable time for cure, as a matter of law, had not expired yet. PRACTICAL TIPS for Business Managers

Don’t try to take advantage of a good faith mistake by another party. You might win, unlike in this case, but the cost may be considerable. This kind of action can impact your reputation. Moreover, it is just dishonest. Put yourself in position of the party who made the mistake: how would you want to be treated? Remember if a seller wishes to disclaim an implied warranty, it must be done with clear, conspicuous language and must use the language of the warranty itself. e.g. if a seller is disclaiming the implied warranty of merchantability include the language “implied warranty of merchantability” in the disclaimer. The UCC was created to ease and facilitate commercial transactions between buyer and seller. When a breach occurs, don’t “lawyer up” and don’t run immediately to litigation. Work it out with the other contractual party if at all possible. Remember the old adage that the only winners when a case goes to trial are the attorneys.

SUMMARY The Basic Performance Obligation Under the UCC, sellers and lessors are obligated to transfer and deliver conforming goods. Buyers and lessees are obligated to accept and pay for conforming goods in accordance with the contract. The UCC requires good faith in the performance and enforcement of every contract. Specific Obligations of Sellers and Lessors The perfect tender rule indicates that if goods or tender of delivery fail in any respect to conform to the contract, the buyer/lessee has the right to accept the goods, reject the entire shipment, or accept part and reject part. Exceptions to the perfect tender rule allow sellers/lessors and buyers/lessees to consider the following: Norms in the industry and past dealings between the parties. Exceptions outlined in the parties’ agreement. The seller’s/lessor’s right to cure. Excuse from performance when identified goods are destroyed through no fault of the parties. The concept of substantial impairment as it relates to revocation of acceptance and installment contracts. The concept of commercial impracticability. Specific Obligations of Buyers and Lessees If all goes well in a transaction over the sale or lease of goods, the buyer or lessee inspects the goods and then pays according to the agreement. The seller or lessor must provide an opportunity for inspection. The concept of reasonableness governs the inspection process. After inspection, the buyer or lessee decides whether to accept the goods. After inspecting, the buyer/lessee signifies acceptance or partial acceptance. Sellers or lessors sometimes presume acceptance. Partial acceptance is allowed in some circumstances. Buyers or lessees are allowed

to revoke or withdraw acceptance of nonconforming goods. Buyers or lessees must issue reasonable notice if they decide to reject goods. Cases in which a buyer decides to assert his or her right to reject nonconforming goods are often categorized under the heading of “rescission or revocation of acceptance by buyer.” Warranties A warranty is a promise on the part of the seller with respect to certain characteristics of the good. Warranties of title: Passage of good title. Implied promise of no liens or judgments against title. Implied promise that title is not subject to any copyright, patent, or trademark infringement. Express warranties: Description of the good’s physical nature or its use. Either general or specific. Material term of the contract. Reliance of buyer on representations. IMPLIED WARRANTIES: Implied warranty of merchantability: A warranty based on a reasonable expectation of performance of the purchased good. The goods must: Pass without objection. Be of fair quality within the description. Be fit for ordinary uses. Have even quality. Be adequately packaged. Conform to promises made on the label. Implied warranty of fitness: A warranty that arises when the seller knows the purpose for which the buyer is purchasing goods and the buyer relies on the seller’s judgment. Implied warranty of trade usage: A warranty that arises as a result of generally accepted trade practices. Warranty Rights of Third Parties The states have three choices regarding the warranty rights of third-party beneficiaries: Seller’s warranties extend to the buyer’s household members and guests. Seller’s warranties extend to any reasonable and foreseeable user. Seller’s warranties extend to anyone injured by the good. Warranty Disclaimers and Waivers Methods of waiving include the following: Seller does not make warranties in the first place (express warranty). Seller disclaims in clear, unambiguous, conspicuous language (implied warranty). Buyer fails or refuses to examine goods. Buyer fails to file suit within the time of the statute of limitations. Magnuson-Moss Act: If a seller decides to issue a written warranty for a consumer good, the seller must indicate whether the warranty is full or limited. The Goal of Contract Remedies Remedies Available to Sellers and Lessors under the UCC The goal of contract remedies is to give the parties the benefit of the bargain they struck and nothing more. When the buyer/lessee is in breach, the seller/lessor can Cancel the contract. Withhold delivery. Sell or dispose of the goods. Sue to recover the purchase price, lease payments due, or some other measure of damages that gives the seller or lessor the benefit of the bargain. Stop delivery. Reclaim the goods. Remedies Available to Buyers and Lessees under the UCC When the seller/lessor is in breach, the buyer/lessee can: Cancel the contract. Obtain cover. Sue to recover damages. Recover the goods. Obtain specific performance. Reject nonconforming goods. Revoke

acceptance of nonconforming goods. Accept the nonconforming goods and seek damages. Modifications or Limitations to the Remedies Otherwise Provided by the UCC Parties to sales and lease contracts are allowed to modify or limit remedies. Courts uphold modifications or limitations to remedies unless the remedies fail in their essential purpose.

Point/Counterpoint Do Implied Warranties Diminish the Fundamental Free Market and the Right to Contract? YES NO Western economies are based on the notion of freedom of contract. Parties are free to enter into the marketplace and negotiate agreements. The only restraint which should be placed on that activity is that a contract for illegal or tortious activity is not enforceable. If the parties wish to include the implied warranties of merchantability and particular purpose then they can do so as express warranties and terms of the agreement. Since most UCC Article 2 contracts are between merchants, these are parties who are well-versed in the machinations of sales contract formation. The current implied warranties are just another example of legal intrusion in the market process and are paternalistic and unneeded. This is a no-brainer. Contracts for the sale of goods should include the implied warranties of merchantability and particular purpose. It is a logical and common sense development in contract law for two significant reasons. First, not all UCC Article 2 contracts are between merchants. Many are between merchants and consumers. As such, the law needs to consider and protect consumers who are less versed and experienced in contract formation. Second, it is just common sense that these implied warranties exist. Who would ever consider buying an item if it does not work as it should? This is the outdated caveat emptor that we abandoned for good reasons over a century ago. Keep the warranties. They make good sense.

Questions & Problems What determines the obligations of sellers/lessors and buyers/lessees? Explain what the good-faith and commercial reasonableness obligations are. Linda Budd went searching for a new friend . . . and she found one for $400. A brand new puppy. She purchased the puppy from Bernadette Vicidomine, a person who regularly sells puppies. Budd took her new friend home but realized that he was not in the best of health. Already attached to him, she did not return the puppy to Vicidomine but, instead, took him to the veterinarian. Nearly $2,400 later, the puppy was medically mended. Budd then sued for the $400 purchase price and nearly $2,400 in

vet bills, alleging breach of the implied warranty of merchantability. Source: Linda Budd, Appellant v. Maureen Quinlan et al., Respondents., 2008 NY Slip Op 28156; 19 Misc. 3d 66; 860 N.Y.S.2d 802; 2008 N.Y. Misc. LEXIS 2472; 66 U.C.C. Rep. Serv. 2d (Callaghan) 358 (2008). An Art Gallery and Plaintiff entered into an Art Administration Agreement, dated March 18, 2004. Pursuant to the Agreement, the Gallery was to administer artworks owned by and acquired for Plaintiff, who would retain title to them. If the Gallery transferred an artwork belonging to Plaintiff, it was required to obtain from the buyer and transmit to Plaintiff a written acknowledgment that Plaintiff was the owner. Transfer of title was required to be from Plaintiff to the buyer. All sales proceeds were to be transmitted to Plaintiff. The Art Gallery sells paintings to the defendant who claims that he takes good title regardless of the restriction of the agreement between the Art Gallery and Plaintiff. Does he? Source: 24 Art Holdings, LLC v. Berry-Hill Galleries, Inc., 2014 N.Y. Misc. Lexis 3562 (2014). Poor Sarah Jane not only had a short-lived marriage, but found out that her supposedly $45,000 ring was worth only half that amount. It seems that the jeweler had misrepresented it to her now ex-husband. Sarah Jane now brings an action against the jeweler for breach of an express warranty. Can she sue even though she was not the purchaser or, in fact, any purchaser? Source: Schaurer v. Mandarin Gems of California, Inc., 125 Cal. Rptr. 4th 949 (2005). Priscilla Webster was dining at her favorite Massachusetts seafood restaurant when matters went horribly wrong. She began choking on a fishbone that had been lurking in her seafood chowder. After a hospital visit and several procedures to extract the bone, Priscilla finally recovered and promptly sued the Blue Ship Tea Room. The issue before the court was whether the restaurant had breached the implied warranty of merchantability and/or particular purpose. This is an oldie but-goodie case from 1964 that is now famous in legal circles. What is your opinion? Source: Webster v. Blue Ship Tea Room Supreme Judicial Court of Massachusetts 347 Mass. 421, 198 N.E.2D 309 (1964). Similarly to the Blue Ship Tea Room in the above question, in this case, plaintiff choked on tuna bones found in canned Bumblebee brand tuna. Is this a breach of the implied warranties under UCC Article 2? Source: Jackson v. Bumble Bee Seafoods, Inc., 2003 Mass. App. Div. 6 (2003). Mrs. Dempsey paid $541 for a poodle named Mr. Dunphy. Unfortunately for Mr. Dunphy, he had an undescended testicle. Mrs. Dempsey could have “inspected” Mr. Dunphy but didn’t. After examinations by multiple veterinarians, Mr. Dunphy’s condition was confirmed. Mrs. Dempsey returned Mr. Dunphy to the seller and demanded her money back. The court began its analysis with, “The first test of merchantable quality is whether the goods ‘pass without objection in the

trade under the contract description' (U.C.C. Sec. 2-314(2)(a)). This standard effectively sums up all of the various 'definitions' of merchantable quality since the principal function of the warranty of merchantability has been to give legal effect to a buyer's reasonable expectations based on trade understanding of the quality of goods normally supplied under such a contract. (51 N.Y. Jur, Sales Sec. 176)." Is an undescended testicle a breach of merchantability? Source: Dempsey v. Rosenthal, 121 Misc.2d 612 (N.Y. 1983). Page 380 Are there limits to the right to cure? Does a breaching party have the right to cure the breach, or can the nonbreaching party proceed directly to a damage claim? Source: See Dunleavy v. Paris Ceramics, 47 Conn. Supp. 565 (2002) for an interesting discussion of the right to cure. Aubrey Reeves purchased a computer system for his business from Radio Shack Computer Center. Radio Shack is the local retailer for products sold by Tandy, its parent company. During negotiations, it became clear that Reeves needed software that Radio Shack could not provide. A Radio Shack salesperson referred Reeves to a software source book, let Reeves know he could choose compatible software from the source book, and informed him that Tandy did not support or service software from the source book. A disclaimer to this effect was in the source book. Reeves eventually purchased computers from Tandy, some software from Tandy, and more specialized software from a company called Lizcon. The Lizcon software did not meet Reeves's needs. Reeves subsequently sent a letter to Tandy, asking for rescission of the contract and damages. Could Reeves rescind? Source: Aubrey's R.V. Center, Inc. v. Tandy Corporation, 731 P.2d 1124 (1987). Landrum sold Gappelberg a big-screen television. The television had many defects, some of which Landrum and his service representatives fixed. Three weeks after the sale, the television stopped working altogether, and Gappelberg let Landrum know. Landrum promised to fix the television, but he did not. Gappelberg then requested return of consideration and asked the service representative to pick up the set but not to repair it because he would not accept it or a replacement. The question in the case was whether Gappelberg was allowed to prevent Landrum from curing the nonconforming television by his refusal to accept a replacement set. What did the court decide? Are you more sympathetic to Landrum or Gappelberg? Source: Leitchfield Development Corp. v. Clark, 757 S.W.2d 207 (1988). The defendant, Sterile Technologies Inc., purchased a sterilizer from the plaintiff, Troy Boiler Works, on an installment payment plan. The defendant was to make installment payments charged with 1.5 percent interest per month. The sterilizer was delivered on August 23, 1996. The last payment was received on April 21, 1998. At the time of the last payment, the defendant

still owed the plaintiff $112,615 as the balance due on the sterilizer; as of the time of the filing of the lawsuit, the defendant owed an additional $134,214 in finance charges. The plaintiff filed its lawsuit to collect on the account on November 20, 2002. The defendant moved to have the suit dismissed because it was filed after the four-year statute of limitations had run out. (April 21, 1998, to November 20, 2002, is four years, seven months, and one day.) Has the statute of limitations run out? Source: Troy Boiler Works, Inc. v. SterileTechnologies, Inc., 777 N.Y.S.2d 574 (2003). Grimberg sold a famous painting to Cohen for $785,000. Possession of the painting passed to Cohen, but payment was never made. Despite various and sundry attempts to resolve the issue, Grimberg never received payment or got the painting back. Cohen was subsequently convicted of fraud. Grimberg filed an insurance claim with his insurance company, which denied payment because, it claimed, Grimberg had transferred title to Cohen. Grimberg claimed that he transferred a voidable title and thus still retained an insurable interest in the painting. Who won? Source: Zurich American Insurance Co., Subscribing to Policy Number IM 8338602, Certificate Number D279FL, Plaintiff-Counter-Defendant-Appellee, v. Felipe Grimberg Fine Art, Fine Arts Services, Inc., Doing Business as Felipe Grimberg Fine Art, Felipe Grimberg, John Does, A-Z, Defendants-Counter-Claimants-Appellants, 08-1300-cv, 2d Cir. Ct. of Appeals, 324 Fed. Appx. 117; 2009 U.S. App. LEXIS 9937; 68 U.C.C. Rep. Serv. 2d (Callaghan) 690, May 7, 2009. A restaurant called The Inn Between entered into a contract to purchase a used restaurant computer system. The contract included installation and training from Remanco Metropolitan Inc. The contract also required Remanco to keep the computer system in good operating order. The system was delivered and installed on March 29, 1995. The following day, the computer malfunctioned and was down for three hours. Between March 30 and July 3, the restaurant contacted Remanco 48 times to report malfunctions. Although Remanco responded to each of the problems, the computer system continued to break down. Inn Between brought an action to revoke its acceptance of the computer system. It viewed the system as a nonconforming good. Remanco counterclaimed, seeking the unpaid price under the system maintenance agreement for nonreturn of the system. Which side got the remedy it sought? Source: The Inn Between, Inc. v. Remanco Metropolitan, Inc., 662 N.Y.S.2d 1011 (1997). Page 381 JRM Hauling & Recycling Services, Inc. (“JRM”), and defendant, The Newark Group, Inc. (“Newark”), agreed to purchase and JRM agreed to sell “all secondary fiber produced by [JRM] at” JRM’s location in Malden, Massachusetts (the “Agreement”). JRM claims that Newark wrongfully terminated the Agreement in January 2015. By its terms,

the Agreement was to run for 10 years from its execution on November 1, 2006, to October 31, 2016. Newark argues that impossibility to perform the contract arose in that performance would result in a $1.5 million dollar loss. Is this claim, if proven, justifiable reason to anticipatorily repudiate the contract? Source: JRM Hauling & Recycling Servs. v. Newark Grp., Inc., 2017 Mass. Super. LEXIS 233 (2017)15; 2006 U.S. App. LEXIS 22227; 60 U.C.C. Rep. Serv. 2d (Callaghan) 1051 (2006).